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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/825,213	04/16/2004	David Venturi	331202.00016	7257

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 05/15/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/825,213

Applicant(s)

VENTURI, DAVID

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE _____ MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10-6-05.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claims 4, 9, 12, 14 recites the broad recitation between..." and the claim also recites "preferably...." which is the narrower statement of the range/limitation.

Claim 17 is indefinite in the use of the phrases "wherein potassium is present in high amounts" and "sodium in small amounts". It is not known what amount is required.

Drawings

INFORMATION ON HOW TO EFFECT DRAWING CHANGES

Replacement Drawing Sheets

Drawing changes must be made by presenting replacement sheets which incorporate the desired changes and which comply with 37 CFR 1.84. An explanation of the changes made must be presented either in the drawing amendments section, or remarks, section of the amendment paper. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). A replacement sheet must include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of the amended drawing(s) must not be labeled as "amended." If the changes to the drawing figure(s) are not accepted by the examiner, applicant will be notified of any required corrective action in the next Office action. No further drawing submission will be required, unless applicant is notified.

Identifying indicia, if provided, should include the title of the invention, inventor's name, and application number, or docket number (if any) if an application number has not been assigned to the application. If this information is provided, it must be placed on the front of each sheet and within the top margin.

Annotated Drawing Sheets

A marked-up copy of any amended drawing figure, including annotations indicating the changes made, may be submitted or required by the examiner. The annotated drawing sheet(s) must be clearly labeled as "Annotated Sheet" and must be presented in the amendment or remarks section that explains the change(s) to the drawings.

Timing of Corrections

Applicant is required to submit acceptable corrected drawings within the time period set in the Office action. See 37 CFR 1.85(a). Failure to take corrective action within the set period will result in ABANDONMENT of the application.

If corrected drawings are required in a Notice of Allowability (PTOL-37), the new drawings MUST be filed within the THREE MONTH shortened statutory period set for reply in the "Notice of Allowability." Extensions of time may NOT be obtained under the provisions of 37 CFR 1.136 for filing the corrected drawings after the mailing of a Notice of Allowability.

The drawings are objected to because drawings 1-4 are not drawings, but tables which should be inserted into the specification. Corrected drawing sheets in compliance

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with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-11, 14, 16-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bell et al (WO0211562).

Bell discloses a composition as in claim 1 containing carbohydrates (fructose), fats, protein, vitamins and minerals (page 18, lines 1-5). Claims 1, 2, 3 and 8 differ from the reference as to whether the amounts of the reference reduce the effect of metabolic syndrome. However, the specification discloses a ratio of COH to fat at the most of 2 to 1 with fat being less than half the amount of the protein. Bell discloses the use of 5 grams of COH, 2 grams of protein and 1.5 g of fat (page 24). No patentable distinction is seen at this time in the differences in the amounts absent anything new or unobvious. The product would reduce the effects of metabolic syndrome since it is close to the same composition. Therefore, it would have been obvious to use amounts close to the claimed amounts.

Claim 4 further requires that the COH are from legume's and rosaceous plants. However, the GI of most foods is well settled, as seen from whole books, which give the GI of foods. Nothing new is seen in choosing foods low in the GI as disclosed by Bell (page 24). Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper

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showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to use carbohydrates from plants, which are known to have a low GI.

The particular amounts of COH derive from peas, apples and rose hips is seen as being within the skill of the ordinary worker as it is known what the effects of various levels of COH have from the GI.

Nothing new is seen in having a GL value below 20 and 10 as in claims 6 and 7 as the composition is the same.

Claim 9 further requires particular amounts of sugars. However, as the GI of the particular sugars is known and the effect they have on the blood sugar, it would have been obvious to use particular amounts.

Claim 10 further requires little or no lactose. However, as the effects of lactose intolerance are well known, plus the sources of lactose, it would have been obvious to make a product without the use of lactose.

Dietary fibers as in claim 11 are disclosed as a form of COH on page 24. The particular amount is seen as being within the skill of the ordinary worker as the function of fiber in the treatment of diabetes is well known. Therefore, it would have been obvious to use fiber in a composition in order to lower the GI.

Claim 16 further requires the use of amino acids and claim 17 vitamins and minerals, claim 18 a particular pH and claim 19 no artificial ingredients. However, these are routine ingredients and pH's and nothing new is seen in their use.

Claim 21 further requires particular amounts of calories which would have been ingredient in the composition and within the skill of the ordinary worker to vary according to the requirements of an individual.

The limitations of claims 22-26 have been disclosed above and are obvious for those reasons.

Claims 12 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Bell US2001/0022980 A1 ('980).

Claim 12 requires particular amounts of omega-3 fatty acids and claim 13 particular amounts of fatty acids and claim 14 particular amounts of DHA and EPA. Bell discloses on page 24, lines 10-25, mayonnaise which contains oil and vegetable oil which contains fatty acids. Bell '980 discloses that various types of fatty acids are known. Fish oil generally contains both omega fatty acids and omega 6 fatty acids (004, 008, 0015). The reference discloses that it is known to balance COH so as to not induce a rise in insulin by providing COH, fats and protein as in claim 1. Therefore, it would have been known to use the claimed fatty acids in the composition of Bell. The particular amounts are seen as being within the skill of the ordinary worker as the function of fatty acids in the body is known. Therefore, it would have been obvious to use known types of fats as disclosed by Bell.

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Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Rernacle et al. (EP 1155627).


Rernacle et al. disclose that eggs containing particular ratios of fats are known (abstract). Claim 15 further requires that whole eggs contain known fats and omega 3 and omega 6 fatty acids. As the eggs are being claimed, the particular amounts would have been inherent. Therefore, it would have been known to use known eggs for their fatty acid contents as shown by Rernacle et al in the process of Bell.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

5-3-06 hp


HELEN PRATT
PRIMARY EXAMINER